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Nos. 266, 267.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

P. O. COX, SAM. LEVY and W. M. EVANS,
Plaintiffs in Error,
vs.
THE STATE OF TEXAS.

P. O. COX, SAM. LEVY and W. M. EVANS,
Plaintiffs in Error,
vs.
W. B. THOMPSON.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Brief in Behalf of Plaintiffs in Error.

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STATEMENT.

The Federal question—Is the Texas statute regulating the business of liquor dealers unconstitutional because wines from grapes grown in that State while in the hands of producers or manufacturers are exempted from its general provisions?

No. 266 is an action by the State commenced in the District Court of Hamilton County, Texas, wherein judgment was rendered against Cox and his bondsmen for fifteen hundred dollars because of three infractions of a

liquor dealer's bond by permitting a minor to enter and remain in his saloon. (R. No. 266, pp. 1, 35, 36.)

No. 267 is an action on the same bond in the same court by the minor's father, in which he recovered three thousand dollars—a penalty of five hundred dollars for each of six infractions, three by selling the minor intoxicants and three by permitting him to enter and remain in the saloon where such drinks were sold. (R. No. 267, pp. 1, 35.)

Both cases arose out of the same facts and the records are so nearly identical that only one brief is necessary.

I will hereinafter consider specially case No. 266, and all references are to that record unless otherwise indicated.

The existing provisions of the Texas law regulating the sale of liquors were carried principally from the act of 1893 into Chapter One—A, Title CIV, Revised Civil Statutes of 1895, which was amended by Chapter 158, Laws of 1897. The act of 1893 and the act of 1897 are printed in full in the brief filed for the State (pp. 9–16). Chapter One—A, Rev. Stat. of 1895 and also the act of 1897 are printed in the brief of Mr. Albright and others for plaintiffs in error (pp. 19–31).

Originally Chapter One—A, Title CIV (Rev. Stat. 1895), contained nine articles—5060*a*, *b*, *c*, *d*, *e*, *f*, *g*, *h* and *i*. The act of 1897 amended Articles 5060*a* and 5060*c* to read as therein specified, and added Article 5060*j*, which applies only where local option exists and is unimportant here.

The following outline of the articles in Chapter One—A, as amended, indicates their relevancy to this controversy:

5060a—

Requires every person selling spirituous, vinous or malt liquors or medicated bitters to pay a specified annual tax on each separate establishment.

5060b—

Gives power to counties and incorporated towns to tax liquor dealers.

5060c—

Requires every person desiring to sell spirituous, vinous or malt liquors or bitters, first to file with the clerk of the county an application for license, under oath, designating place of business, quantities in which he proposes to sell—whether one gallon and more, or one gallon and less—and whether it is to be drunk on the premises. Also to pay the full annual tax and file bond required by Article 5060*g*.

5060d—

Provides for issuance of license after application is filed and taxes paid.

5060e—

No license shall be granted for more than a year, and shall authorize sales only at place specified.

5060f—

Provides for reports by clerks and collectors.

5060g—

Any person desiring to sell spirituous, vinous or malt liquors or intoxicating bitters, to be drunk on the premises, shall, before engaging in such sale, enter into a bond for $5,000 with sureties, payable to the State, with the following conditions:

That said person shall keep an open, quiet, and orderly place; that he will not sell, or permit to be sold, at his place, nor give, nor permit to be given, any spirituous, vinous or malt liquors or intoxicating bitters to any person under the age of twenty-one, or to a student of any institution of learning, or to an habitual drunkard, or to any person after having received a written prohibition from his wife, etc.; that he will not permit any person

under twenty-one to enter and remain in such place, nor permit any games prohibited by law in or about the place, or rent or let any part of the house for conducting any such game; that he will not adulterate liquors or knowingly sell any impure or adulterated.

The bond shall be recorded, and any one aggrieved by its breach may sue on it and be entitled to recover $500.00 as liquidated damages for each infraction until the full penalty is exhausted.

In addition to the civil proceedings by any injured one the county attorney, for its benefit, shall sue in the name of the State for $500.00 penalty for each infraction.

Whenever a bond has been or is about to be exhausted, a new one must be given before the dealer may continue the business.

One who sells without first giving bond is guilty of a misdemeanor.

An open, a quiet, and an orderly house are defined; a method is designated by which the surety may be released; and a provision is added exempting from recovery for sale to a minor, if made in good faith with well-grounded belief of his majority.

5060h—

Defines an habitual drunkard.

5060i—

"*The provisions of this chapter shall not apply to wines produced from grapes grown in this State while the same is in the hands of producers or manufacturers thereof.*"

5060j—

Applies only in localities where local option prevails.

Section 20, Art. 16, Constitution of Texas—

The legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of

said county), may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.

A chapter of the Texas Revised Statutes is devoted to local option. Articles 3384 to 3399 make provision for adopting the same by counties, &c.

Certain provisions of the Penal Statutes which it may be desirable to consult are printed on pages 30 and 31 of the brief by Messrs. Albright and others for plaintiffs in error.

The complaint in substance alleges (R. 1–5)—

P. O. Cox is a citizen of Hamilton County, Texas, engaged in the business of a retail liquor dealer at Hico;

That in May, 1902, Cox made application for and procured a license to engage in the business of retailing spirituous, vinous and malt liquors, and bitters capable of producing intoxication;

That in order to procure the license and pursue such business, as required by law, he executed a bond for five thousand dollars, payable to the State of Texas, with the other plaintiffs in error as sureties;

That under the bond and license he was authorized to engage in the business of retailing spirituous, vinous and malt liquors, and medicated bitters;

That the bond was conditioned, among other things, that the principal would not sell, or permit to be sold, any spirituous, vinous, or malt liquors, or intoxicating bitters, to any person under the age of twenty-one years, nor to permit any such person to enter or remain in the house where the business was carried on;

That about May 30, 1902, one Thompson, under the age of twenty-one, six times entered and remained in the place of business of P. O. Cox and each time was sold and given spirituous, vinous and malt liquors and bitters;

That for each infraction of the bond the State is entitled

to recover five hundred dollars penalty, in all six thousand dollars, for which sum judgment is asked.

A demurrer was interposed setting up, among other things, that the act of the Legislature regulating the sale of liquor, under which suit was brought, is unconstitutional because Article 5060*i* exempts from its general provisions persons engaged in selling wines produced from grapes grown in the State of Texas. (R. 5, 6.)

The demurrer was overruled and the case tried to a jury, which found "three infractions of the bond for entering and remaining in said Cox's saloon," and assessed damages for fifteen hundred dollars in the aggregate. (R. 35, 36.) Judgment was entered accordingly.

Motion for new trial was duly filed wherein this reason, among others, was specified (R. 36):—The court erred in overruling defendant's demurrer relying on the invalidity of the act under which suit was brought because of the exemption from its provisions of persons engaged in the sale of wine produced from grapes grown in the State. Said act is unconstitutional and repugnant to the Fourteenth Amendment of the Federal Constitution, providing that no State shall deny to any person within its jurisdiction the equal protection of the law.

The motion was considered and denied, a bill of exceptions was settled, appeal taken to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, and errors were assigned. (R. 38, 39.) Among them is this—No. 14. The court erred in that it rendered judgment against the defendants on said bond, for that the law requiring the giving of the same is unconstitutional, being violative of section 1 of Article 14 of the United States Constitution, in that it is class legislation, and also Article 3 of the bill of rights of the State of Texas (R. 42).

The Court of Civil Appeals held there was no error and affirmed the judgment below. (R. 47.) In case No. 267 (R. 48) a written opinion specifically denied the contentions specified in the assignments based upon the Fourteenth Amendment. (85 S. W. Rep. 34.) No opinion was filed in 266.

The Court of Appeals overruled a motion for rehearing, wherein it is specifically stated "the court erred in holding that the court below did not err in rendering judgment against the defendants, appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional, being violative of section 1, Article Fourteen, of the United States Constitution, in that it is class legislation." (R. 47, 52.)

Application for a writ of error to the Supreme Court of the State distinctly alleged that the Court of Civil Appeals erred in holding the fourteenth assignment of error was not well taken, and in holding that the court below did not err in rendering judgment against the defendants, appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional, being violative of section 1, Article 14, of the Constitution of the United States, in that it is class legislation. R. 53 *et seq.*) This point was elaborated and pressed with earnestness.

The application was denied and the judgment of the Court of Civil Appeals became final without possibility of review by any higher State court. (R. 63.) A writ of error was sued out, errors assigned, and the case brought here.

ARGUMENT.

I.

The record presents a single question—Does exemption from the general provisions of the Texas statute regulating the liquor business, of wines produced from domestic grapes while in the hands of producers or manufacturers, render it obnoxious to the Fourteenth Amendment, which forbids denial of the equal protection of the laws? In order to prevail plaintiffs in error must establish an affirmative answer.

In *Doughit* v. *The State*—1904—(98 Texas, 344; 83 S. W. Rep. 795) the Supreme Court of Texas considered and denied the contention that the statute in question conflicts with the Fourteenth Amendment. It said—"We are unable to distinguish upon any sound principle the point from that ruled upon by the Supreme Court of the United States in the case of *The American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89." The State courts followed Doughit's case in the causes now under consideration.

Counsel for the State maintain that the brief heretofore filed in behalf of plaintiffs in error admits the taxation features of the statute are good, and, therefore, they proceed to argue the whole enactment is valid. (Br. 6, 21, 26.) I distinctly disclaim any such admission and submit that the language (quoted by opponents in part) in the brief of my associates does not warrant the argument or justify the suggested conclusion.

Intoxicating liquors are recognized by the constitution and laws of Texas as legitimate articles of commerce.

In *Scott* v. *Donald*, (165 U. S. 58, 91,) this court declared:

> So long, however, as State legislation continues to recognize wines, beer, and spirituous liquors as articles

of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles. [See also *Leisy* v. *Hardin*, 135 U. S. 100.]

The Fourteenth Amendment provides—'No State shall deny to any person within its jurisdiction the equal protection of the laws.'

Those who in Texas are engaged in the liquor traffic are as fully guaranteed against denial of the equal protection of the laws by the State as are persons in any other business, *e. g.*, dealers in flour or dry goods. And every one of them has the constitutional right to buy and sell liquors subject to the same restrictions, and no others, prescribed for other dealers in the same character of merchandise under like circumstances.

The intoxicating quality of alcoholic liquors causes traffic therein to be attended by peculiar evils, and in order to mitigate these the State has the right, discriminating between liquor merchants and all others, to subject the former to appropriate, reasonable, special and stringent regulations. The peculiar object to be attained (greater sobriety) justifies a discrimination which may tend to effectuate it, but when that object is not really present the power so to discriminate does not exist. (*Mugler* v. *Kansas*, 123 U. S. 623, 661.) If to lessen intoxication it is proper to prescribe different treatment for classes of wine merchants, *e. g.*, wholesalers and retailers, the State may do so, but the occasion therefor in furtherance of the fundamental purpose must appear. The class restrictions must find warrant in the evil to be met and apply equally and impartially to all similarly situated—difference in treatment is unwarranted unless conditions are substantially dissimilar. The same general principle would govern in respect of laws concerning the sale of

any dangerous article—liquors, gunpowder or kerosene. It follows if one may sell intoxicants without license and without civil responsibility, all under like conditions may do the same thing, and the like conditions must have relation to the evils calling for correction.

The statutes of Texas permit the producer or manufacturer of intoxicating wines from grapes of the State to sell them without license, without bond, and without tax, where he will and in such quantities as he may desire, to be drunk on the premises. But if one not a producer or manufacturer desires to sell Texas wines or any other liquors, *e. g.*, California wines, he must procure a license, pay a heavy tax, and give bond with onerous condition, for an infraction of which he is liable to two suits with recovery in each of five hundred dollars.

I submit the State, without adequate reason therefor, has attempted to give a special privilege and exemption to producers and manufacturers of domestic grape wines (other domestic wines are not privileged), and has thereby denied the equal protection of the laws to all others engaged in like traffic. The distinction is not justified by the reason which must support the harsh restrictions imposed generally on liquor dealers—the necessity of mitigating the evils of intoxication; nor does it aid in enforcing the law in an administrative way or otherwise. Texas grape wines are not innocuous because peddled out by a manufacturer, and are no less deleterious to health and morals than similar wines from other States. To permit their unrestricted sale tends rather to defeat than to aid the purpose which must be relied on to support the general provisions of the law.

Much more than taxation is involved in the statute in question. Arbitrarily and without adequate reason it puts burdensome restrictions on certain dealers not imposed upon others who sell the same character of merchandise. It has entered the domain of trade and commerce

and arbitrarily discriminated against some by declaring that particular classes should be exempt from the operation of a statute denouncing as criminal certain things connected therewith.

It requires no argument to show the State could not, in a pure revenue measure, require dealers in foreign wines to pay a tax and operate under stringent regulations while exempting therefrom persons engaged in selling domestic wines. Revenue laws may sometimes properly discriminate between producers and dealers, but there must always be therefor some clear and adequate reason. A burden or restriction imposed upon one and not applicable to all, in order to be valid "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155.)

Why should a manufacturer of wines from Texas grapes, however intoxicating, be permitted to set up a saloon in Hico (500 miles from the place of manufacture) and retail it without license, without tax, without bond, and without civil responsibility, when the man next door may not sell the same wines or any other kind of wines—even less harmful and intoxicating ones—without being heavily taxed and subjected to the most onerous responsibility?

The special burdens and impediments which the statutes throw about the liquor traffic must find warrant in the purpose to curtail the evils produced by the intoxicating quality of the article sold. That is the thing which justifies the discrimination between those who deal therein and all other merchants. The equal protection of the laws is accordingly denied when something burdensome is demanded of one seller of intoxicants and not

required of another who deals in the self-same stuff under like circumstances. Because one has raised the grapes or manufactured the wine from them does not render drinking them less intoxicating nor make his place where the same are disposed of by the drink harmless to the community. Intoxication is not relieved of evil effects because the liquor producing it originated in Texas.

II.

In support of the contention for plaintiffs in error we rely on *Connolly* v. *Union Sewer Pipe Company*, (184 U. S. 540, 546 *et seq.*) That case, recently decided, contains an exhaustive review of authorities and thorough discussion of the principles applicable here.

The Illinois statute in general words declared unlawful combinations to restrict trade, limit production, increase or fix prices, prevent competition, pool interests, &c., but declared—"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." It was challenged as obnoxious to the equal protection clause of the Fourteenth Amendment, in that it permitted agriculturalists and stock raisers to do with impunity what would be criminal if undertaken by others; and this court held the enactment utterly void. Mr. Justice Harlan, speaking for the court, said:

> (p. 556.) Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the

public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations or associations of persons, who shall have combined their capital, skill or acts, in respect of their property, merchandise or commodities held for sale or exchange, is made by the statute a public offence. * * * Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause of the Fourteenth Amendment which declares that "no State shall * * * deny to any person within its jurisdiction the equal protection of the laws?"

(p. 558.) What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a State enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guarantee of the equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Missouri* v. *Lewis*, 101 U. S. 22, 31. We have also said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction

the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." *Barbier* v. *Connolly*, 113 U. S. 27, 31. This language was cited with approval in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, in which it was also said that "the equal protection of the laws is a pledge of the protection of equal laws." In *Hayes* v. *Missouri*, 120 U. S. 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, "shall be treated alike, under like circumstances and considerations, both in the privileges conferred and in the limitations imposed." "Due process of law and the equal protection of the laws," this court has said, "are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." *Duncan* v. *Missouri*, 152 U. S. 377, 382. Many other cases in this court are to the like effect.

After referring to *Magoun* v. *Illinois Trust & Savings Bank*, (170 U. S. 283,) and *American Sugar Refining Company* v. *Louisiana*, (179 U. S. 89,) the Justice further said:

(p. 562.) The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a State enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. * * * A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and, at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domes-

tic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

Looking specially at the Texas statute it will be seen that the producer or manufacturer of wines from Texas grapes may sell them in such quantities and in such place as he desires, without license, without tax, without giving bond not to sell to minors, to keep an orderly house, &c., and without the extraordinary liability which an infraction of such bond entails. But exactly the same thing cannot be done without criminal liability by any other man in respect of his property of the self-same kind, as, *e. g.*, Texas wines purchased by him from the producer or manufacturer, or California wines perhaps less intoxicating.

The exemption in the Illinois statute rendered it null, and I submit the same reasoning which led to that result requires a like conclusion as to the act under consideration.

The Texas courts in support of their conclusion upholding the statute referred to the ruling in *American Sugar Refining Company* v. *Louisiana* (179 U. S. 89), but the case seems clearly inapplicable when read in the light of the comments upon it quoted above.

The recent case (April 16, 1906)—*Frederick St. John* v. *The People*—opinion by Mr. Justice McKenna—follows the well-settled rule that different treatment may be accorded to those dissimilarly situated. The statute in question therein discriminated between producers and non-producers of milk as to its sale when below standard, and was upheld. The court said—"Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated," and held

that the challenged classification was a proper one for administrative reasons, being useful in the proper enforcement of the fundamental purpose of the enactment and in preventing evasions otherwise difficult, perhaps impossible, to detect.

In the present case no such administrative necessity is present, and it certainly does not seem to be an especial aid in mitigating the evils attending the sale of intoxicants to permit producers and manufacturers of domestic grape wines to do as they please with it.

Tiernan v. *Rinker*, (102 U. S. 123,) is cited by the State in support of the proposition that as plaintiff in error Cox was engaged in selling other liquors besides wines he is not in position to challenge the validity of the statute.

The point at issue in Tiernan's case was the constitutionality of a Texas revenue act which imposed a license tax upon dealers in spirituous, vinous or malt liquors, but exempted therefrom beers and wines produced in the State. The act was challenged as in violation of the commerce clause of the Constitution, and the court held it could not be enforced against one who sold only foreign beer or wine because of the exemption, but could be as to one who sold whiskey. Petitioners expressly alleged in their injunction bill that they were engaged in the "occupation of selling spirituous, vinous, malt and other intoxicating liquors." The provisions of the statute were severable.

In the present case we maintain that the statute is wholly bad because it denies the equal protection of the laws to persons within the jurisdiction of the State. Dealers in domestic wines and other similar articles wholly subject to the State's authority receive different treatment without adequate reason, and such manifestly

was the expressed intention of the Legislature. This feature of the law cannot be eradicated and the whole must fail.

I respectfully ask that the statute be declared invalid and that the action of the State court be reversed.

J. C. McREYNOLDS,
Counsel for Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES

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BRIEF OF DEFENDANT IN ERROR, THE STATE OF TEXAS.

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THE STATE PRINTING CO., AUSTIN, TEXAS.

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